Filed 12/30/08 Uneeda Enterprises v. Dekar Industries CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

UNEEDA ENTERPRISES, Plaintiff and Respondent, v. DEKAR INDUSTRIES et al., Defendants; SAM KARAWIA, Objector and Appellant.	B207614 (Los Angeles County Super. Ct. No. BC360380)

APPEAL from an order of the Superior Court of Los Angeles County. Phrasel L. Shelton, Judge. (Retired Judge of the San Mateo Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Prindle, Decker & Amaro, Michael L. Amaro and Rudie D. Baldwin for Objector and Appellant.

Law Offices of Robert P. Baker and Robert P. Baker for Plaintiff and Respondent.

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Objector and appellant Sam Karawia appeals from an order imposing sanctions against him in the amount of $6,000 payable to plaintiff and respondent Uneeda Enterprises doing business as Brag Sales, Inc. (Brag). The trial court imposed sanctions in connection with its granting Brag's motions to compel further responses to interrogatories and further production of documents. Appellant contends that sanctions should not have been imposed because he offered substantial justification for refusing to produce the requested discovery and, alternatively, argues that the sanctions amount is excessive. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Brag filed a complaint against appellant on October 16, 2006 and subsequently filed the operative third amended complaint in November 2007.[1] At all relevant times, appellant was the owner and president of Dekar Industries (Dekar). Brag was a creditor of Dekar at the time Dekar's assets were sold to Shamrock Acquisition Corporation. The complaint alleged causes of action for fraud, fraudulent conveyance and federal RICO violations.

On February 27, 2008, Brag filed two motions—a motion to compel answers by appellant to a first set of form interrogatories and for sanctions against appellant and his attorneys in the amount of $4,040, and a motion to compel production of documents by

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[1] In his opening brief, appellant recites the circumstances leading to the complaint and characterizes the complaint's allegations as involving the recovery of unpaid invoices. He has not, however, supported that aspect of the brief with citations to the record, as his limited designation of record did not include the pleadings. It is the appellant's burden to provide an adequate record on appeal and we disregard any factual recitations or characterizations that are unsupported by the record. (See generally *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295–1296 [to overcome presumption on appeal that an appealed judgment or order is correct, appellant must provide an adequate record demonstrating error]; *Estrada v. Ramirez* (1999) 71 Cal.App.4th 618, 620, fn. 1 [burden on appellant to provide accurate record on appeal to demonstrate error; failure to do so "precludes an adequate review and results in affirmance of the trial court's determination"].)

appellant and for sanctions against appellant and his attorneys in the amount of $4,040. Appellant had objected to the requested discovery on the ground that he was not a party to contracts executed by Dekar and was therefore not obligated to respond to questions about those contracts or produce documents related to them.

Appellant opposed the motions on the same basis, asserting that he was unable to locate responsive documents because he—in his personal capacity—had no relationship to the alleged dispute involving Dekar. Appellant maintained his opposition notwithstanding Brag's agreement to stipulate that appellant would not be admitting any alter ego status by responding to interrogatories or producing documents.

Following a March 27, 2008 hearing on the motions, the trial court issued a minute order granting the motions. It also imposed sanctions in the amount of $6,000. It characterized the sanctions as a reduced amount, which it calculated by deducting approximately $1,000 from each $4,040 request because those amounts had included attorney time for preparing replies to the motions and no replies were filed. Appellant appealed from the award of sanctions.

DISCUSSION

Appellant challenges the imposition of sanctions on two grounds. First, he contends that there was no basis for the imposition of sanctions, as he offered substantial justification for refusing to provide the requested discovery. Alternatively, he contends that the amount of the sanctions award was excessive and should, at a minimum, be reduced. We find no merit to either contention.

I. Appealability.

Though it did not file a motion to dismiss, Brag argues that the appeal should be dismissed because the sanctions award is below the jurisdictional limit. Code of Civil Procedure section 904.1, subdivision (a)(12), provides that an order imposing monetary sanctions for discovery violations is appealable prior to entry of final judgment when the amount of the sanction exceeds $5,000. Brag contends that the $6,000 sanctions award

was comprised of two separate $3,000 awards, each of which is below the statutorily required amount. And though Brag fails to cite any authority for its argument, it is settled law that orders separately imposing sanctions generally cannot be aggregated to reach the $5,000 threshold that permits an immediate appeal. (See *Calhoun v. Vallejo City Unified School Dist.* (1993) 20 Cal.App.4th 39, 45 (*Calhoun*); 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 105, pp. 167–168.)

According to the trial court's minute order, appellant and his attorneys were "ordered to pay to plaintiff sanctions of $6,000.00 within 30 days." Likewise, the notice of ruling prepared by Brag stated that "[s]anctions were awarded to Plaintiff . . . in the amount of $6,000 . . . ." Because the sanctions award was a single amount, payable to a single entity, we do not believe that the $6,000 figure can be characterized as an aggregated amount. In *Calhoun*, the court dismissed an appeal, declining to find that the jurisdictional limit was met by a challenge to two sanctions awards imposed at the same time—each below the statutory limit and each payable to a different party. (*Calhoun, supra*, 20 Cal.App.4th at pp. 43–44.) Here, in contrast, the sanctions award was imposed as a single amount, payable only to Brag. (See *Champion/L.B.S. Associates Development Co. v. E-Z Serve Petroleum Marketing, Inc.* (1993) 15 Cal.App.4th 56, 59, 60 [recognizing that aggregation may be appropriate in certain situations, such as where a motion to compel is granted after "a defendant simultaneously propounds a set of interrogatories, a set of requests for admission, and a request for production of documents to a plaintiff, and defendant believes plaintiff's responses are inadequate," because "[i]n such a case, it could well be that it is the same conduct which is being sanctioned three times"].) Accordingly, we decline Brag's invitation to dismiss the appeal and will address it on the merits. (See also Code Civ. Proc., § 904.1, subd. (b) [sanctions orders of $5,000 or less may be reviewed on appeal at the discretion of the appellate court].)

II. The Trial Court Properly Exercised Its Discretion in Imposing Sanctions.

A trial court must impose discovery sanctions against a party who unsuccessfully makes or opposes a motion to compel, unless it determines that the party subject to the

sanction "acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (Code Civ. Proc., §§ 2030.300, subd. (d), 2031.310, subd. (d); see *Foothill Properties v. Lyon/Copley Corona Associates* (1996) 46 Cal.App.4th 1542, 1557.) "'"'The power to impose discovery sanctions is a broad discretion subject to reversal only for arbitrary, capricious, or whimsical action. [Citations.] Only two facts are absolutely prerequisite to imposition of the sanction: (1) there must be a failure to comply . . . and (2) the failure must be willful . . . .'"' [Citation.]" (*R.S. Creative, Inc. v. Creative Cotton, Ltd*. (1999) 75 Cal.App.4th 486, 496.)

The limited record on appeal demonstrates that appellant willfully failed to comply with discovery requests by declining to answer interrogatories and refusing to produce documents. Appellant contends that sanctions were unwarranted on the basis of this conduct because he offered substantial justification for opposing the motion to compel such discovery. His asserted justification was that he, as an individual, had no relationship to the dispute between the corporate entities Brag and Dekar and was therefore not obligated to provide the requested discovery.

The trial court properly determined that appellant's justification for not responding to discovery was an insufficient basis to preclude the imposition of sanctions. "[A] party has a general duty to conduct a reasonable investigation to obtain responsive information [citation], and must furnish information from all sources under his or her control. [Citation.]" (*Regency Health Services, Inc. v. Superior Court* (1998) 64 Cal.App.4th 1496, 1504; see also *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 782 [a party responding to discovery "cannot plead ignorance to information which can be obtained from sources under his control"].) Appellant was obligated to provide information of which he was aware, notwithstanding that he was not individually a party to the contracts in dispute. (See *In re Marriage of Chakko* (2004) 115 Cal.App.4th 104, 107–109 [affirming sanctions order for a party's failure to produce requested financial records related to the company he controlled].)

Moreover, Brag's offer to stipulate that appellant's responses would not be deemed any admission of alter ego status as to Dekar completely obviated appellant's purported concern about maintaining the separate status of Dekar as a legal entity. The authority cited by appellant addresses only this concern and in no way bears on a party's discovery obligations. (See *Michaelis v. Benavides* (1998) 61 Cal.App.4th 681, 688 ["The legal fiction of the corporation as an independent entity is partly intended to insulate corporate officers from personal liability for corporate contracts"].)

The trial court properly exercised its discretion in finding that appellant failed to offer substantial justification for refusing to respond to discovery requests. Appellant has not asserted there were "other circumstances" that would have made the imposition of sanctions unjust. Under these circumstances, the trial court was statutorily mandated to impose sanctions and there is no basis to disturb the sanctions order.

III. The Trial Court Properly Exercised Its Discretion in Awarding $6,000 in Sanctions.

Monetary sanctions for discovery abuses are governed by Code of Civil Procedure sections 2023.030 to 2023.040. A request for monetary sanctions must be supported by points and authorities as well as a declaration setting forth facts supporting the amount sought. (Code Civ. Proc., § 2023.040.) Here, counsel submitted a declaration in connection with each request for sanctions indicating that his customary rate was $500 per hour, he spent five hours preparing each motion, and he anticipated he would spend an additional five hours preparing a reply and attending the hearing. At the hearing, appellant argued that the amount requested was excessive because the motions were virtually identical and no replies were filed. Implicitly rejecting the first argument, the trial court reduced the requested sanction by $2,000—an amount representing a deduction of two hours from each motion for the absence of reply briefs.

Appellant contends the $6,000 sanctions award was excessive because it bore too high a ratio to the approximately $30,000 in damages requested in the complaint, counsel's hourly rate was excessive and the two motions were identical. As with the

determination whether to impose sanctions, the trial court's selection of a particular discovery sanction is an exercise of discretion, "subject to reversal only for manifest abuse exceeding the bounds of reason." (*Kuhns v. State of California* (1992) 8 Cal.App.4th 982, 988.)

We summarily disregard appellant's first contention. Because the complaint is not a part of the record on appeal, we have no basis for assessing whether the sanctions award is disproportionate relative to the damages request. (E.g., *Bennett v. McCall* (1993) 19 Cal.App.4th 122, 127 ["The appellant must affirmatively demonstrate error by an adequate record. In the absence of a contrary showing in the record, all presumptions in favor of the trial court's action will be made by the appellate court"].) We likewise disregard appellant's second contention regarding counsel's hourly rate because he did not raise this issue below. (See, e.g., *Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 830 [generally issues raised for the first time on appeal and not litigated below are deemed waived]; *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847 [failure to raise issue at trial waives that issue].)

Finally, we reject appellant's final contention that the trial court abused its discretion by not finding that the time spent on the two motions to compel was duplicative. Appellant's argument that a review of the two motions demonstrates their similarity is patently insufficient. As explained in *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564: "In challenging attorney fees as excessive because too many hours of work are claimed, it is the burden of the challenging party to point to the specific items challenged, with a sufficient argument and citations to the evidence. General arguments that fees claimed are excessive, duplicative, or unrelated do not suffice. Failure to raise specific challenges in the trial court forfeits the claim on appeal." Given that the motions to compel separately addressed appellant's conduct in failing to respond to interrogatories and failing to produce documents, the trial court properly exercised its discretion in concluding that any facial similarity of the motions did not warrant a reduction in the amount of sanctions requested.

IV. We Decline to Impose Sanctions on Appeal.

Brag has filed a motion requesting that this court impose sanctions on appellant for filing a frivolous appeal. (See Code Civ. Proc., § 907; Cal. Rules of Court, rule 8.276.) The court in *In re Marriage of Flaherty* (1982) 31 Cal.3d 637 (*Flaherty*) set forth the standards for determining whether an appeal is frivolous. An appeal may be found frivolous and sanctions imposed when (1) the appeal was prosecuted for an improper motive to harass the respondent or delay the effect of an adverse judgment; or (2) the appeal indisputably has no merit—that is, when any reasonable attorney would agree the appeal is totally and completely without merit. (*Id*. at p. 650.) But the *Flaherty* court cautioned that "any definition [of a frivolous appeal] must be read so as to avoid a serious chilling effect on the assertion of litigants' rights on appeal. Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions." (*Ibid*.)

Although appellant's contentions are not meritorious, we do not find the appeal to be sufficiently egregious so as to be considered frivolous or brought in bad faith and, accordingly, we deny the motion for sanctions.

DISPOSITION

The order imposing sanctions against appellant is affirmed. Respondent is entitled to its costs on appeal.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ